EXHIBIT 3

Responsiveness Summary

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA and THE COMMONWEALTH OF MASSACHUSETTS, Plaintiffs, v. SPRAGUE RESOURCES LP and SPRAGUE OPERATING RESOURCES, LLC, Defendants.	)	Civil No. 1:20-cv-11026-LTS

RESPONSIVENESS SUMMARY

INTRODUCTION

On May 29, 2020, the United States and its co-plaintiff, the Commonwealth of Massachusetts (the "Commonwealth" or "Massachusetts"), filed a Complaint initiating the above-captioned action. Dkt. No. 1. In the Complaint, the United States asserts claims against defendants Sprague Resources LP and Sprague Operating Resources, LLC (collectively, "Sprague" or "Defendants") under Sections 113(a)(1) and 113(b) of the Clean Air Act, 42 U.S.C. §§ 7413(a)(1) and 7413(b), and the Massachusetts, Maine, New Hampshire, and Rhode Island state implementation plans ("SIPs"). The Commonwealth of Massachusetts brings claims against Sprague for violations of the Massachusetts Clean Air Act and the Massachusetts air pollution control regulations. Concurrently, the United States lodged a proposed Consent Decree that, if approved, would resolve all claims in the Complaint. Dkt. Nos. 1-4 (Notice of Lodging), 1-5 (Consent Decree).

On June 4, 2020, under Paragraph 77 of the Consent Decree, in accordance with 28 C.F.R. § 50.7, the United States Department of Justice ("Department of Justice" or "DOJ") published a notice of lodging of the proposed Consent Decree in the Federal Register, and invited the public to submit comments on the settlement for a period of thirty days. 85 *Fed. Reg.* 34,466 (June 4, 2020). The United States published a subsequent notice in the Federal Register on July 2, 2020, extending the public comment period through August 5, 2020. 85 *Fed. Reg.* 39,934 (July 2, 2020). During this two-month period, the United States received approximately 18 comments.[1] These comments relate primarily to two of the six Sprague facilities identified in the Complaint: Sprague's facilities in the City of South Portland, Maine ("South Portland" or the "City"), and Town of Newington, New Hampshire ("Newington" or the "Town").

After reviewing all submitted comments, for the reasons discussed in the accompanying United States' Consented-To Motion To Enter Consent Decree With Incorporated Memorandum of Law (the "Motion"), the United States has determined that the comments do not disclose facts or considerations indicating that the proposed Consent Decree is inappropriate, improper, or inadequate, and therefore the United States seeks the Court's approval and entry of the Consent Decree. This Responsiveness Summary sets forth the United States' responses to all public comments received during the two-month public comment period.[2]

RESPONSES TO COMMENTS

This Responsiveness Summary addresses comments by subject area and topic, identified in bolded section and subsection headings, with citations to comments within each topic identified by Bates numbers appearing in Exhibit 2 on each page of the comments.

[1] The United States treats as one comment each (1) the same or similar comments from a single commenter and (2) a comment from the Town of Newington, New Hampshire, that attaches correspondence to the Town from several citizens. Regardless of how they are counted, the United States considered all comments it received during the extended comment period and has attached them to the Motion as Exhibit 2.

[2] Unless otherwise stated, "Exhibit" or "Ex." refers to an exhibit to the Motion.

I. Comments Regarding Public Notice and Participation

The public comment period for the proposed Consent Decree is too short. South Portland requests a sixty-day extension of the public comment period.[3]

Under 28 C.F.R. § 50.7, it is the policy of the Department of Justice to afford persons not named as parties to an enforcement action the opportunity to comment on a proposed consent decree in an action to enjoin discharges of pollutants into the environment. *Id.* Accordingly, the Department of Justice provides at least 30 days after a proposed environmental consent decree is lodged with the appropriate court to submit comments on the proposed decree. *Id.*

In this case, on May 29, 2020, concurrently with the filing of its Complaint, the United States lodged with the Court the proposed Consent Decree. Dkt. Nos. 1-4 (Notice of Lodging) and 1-5 (Consent Decree). Under Paragraph 77 of the Decree, consistent with 28 C.F.R. § 50.7, the United States published a notice of lodging of the proposed Consent Decree in the *Federal Register*, on June 4, 2020, which triggered the commencement of a 30-day period, from June 4 through July 4, 2020, in which the public could submit comments on the proposed Consent Decree. 85 *Fed. Reg.* 34,466 (June 4, 2020). On June 18, 2020, the City of South Portland, Maine, submitted a request for an extension of the public comment period by 60 days. In response to the City's request, after discussion with counsel for the City, the Department of Justice published a *Federal Register* notice on July 2, 2020, which extended the public comment period by 32 days, to August 5, 2020. 85 *Fed. Reg.* 39,934 (July 2, 2020).

Thus, the extended public comment period ran for 62 days, from June 4 to August 5, 2020, more than twice as long as the usual 30-day period provided under 28 C.F.R. § 50.7. The City did not object to this extension or submit any further comment on the duration of the public comment period.

South Portland was unaware of the terms of the Consent Decree until they were made public.[4]

In accordance with general policy and practice, the settlement negotiations in this matter have been confidential. Maintaining confidentiality in settlement negotiations promotes the free exchange of proposals and counter-proposals, provides negotiators flexibility to adjust their positions and strategies as needed to address the positions taken by the opposing party, and increases the likelihood of an amicable resolution of disputed claims. *See United States v. Town of Moreau, New York*, 979 F. Supp. 129, 135-36 (N.D.N.Y. 1997) ("it is doubtful that a public settlement conference would ever permit the type of give and take that would lead to an agreed resolution of the dispute.").

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[3] Motion Ex. 2 (Public Comments), Bates Nos. SPC00001-05 (South Portland / Kendall).

[4] *See* Motion Ex. 2 (Public Comments), Bates Nos. SPC00001-05 (South Portland / Kendall) (requesting extension of public comment period).

The City of South Portland is not a party to the Complaint or the Consent Decree in this case. The United States is not required by the Clean Air Act or any other statute or regulation, to involve nonparties or the public in its confidential settlement meetings or its privileged internal deliberations regarding whether and how to exercise its discretion to compromise federal claims. As the First Circuit has held:

> the government is under no obligation to telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility which any negotiator cherishes…. So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses.

U.S. v. Cannons Eng'g Corp., 899 F.2d 79, 93 (1st Cir. 1990); *see also United States v. Comunidades Unidas Contra La Contamination*, 204 F.3d 275, 277 (1st Cir. 2000) (court rejected objections to a settlement based upon lack of participation by intervener in negotiations). Accordingly, EPA policy requires that the agency conduct settlement discussions confidentially, to the fullest extent allowed by law. EPA, *Memorandum: Restrictions on Communicating with Outside Parties Regarding Enforcement Actions* (March 8, 2006), currently available at https://www.epa.gov/sites/production/files/documents/commrestrictions-nakayamamemo030806_0.pdf.

II. Comments Regarding Omission from Consent Decree of Requirement for Sprague to Seek A License Amendment Providing for Injunctive Relief at the South Portland Facility

The City of South Portland notes in its public comments that the Consent Decree lacks, and requests that the parties add, a provision requiring Sprague to seek a license amendment from the State of Maine that incorporates operational limits "at least as stringent as" those required by the Consent Decree for the South Portland Facility, including limits on throughput and on the number of tanks Sprague may use at any one time to store No. 6 oil and asphalt.[5]

The United States agrees. The parties had intended to include in Appendix G of the Consent Decree a requirement that Sprague seek a license amendment incorporating throughput and operational limits at least as stringent as those provided in the Consent Decree for the South Portland Facility and had included such a provision in earlier drafts of the Consent Decree. But the parties inadvertently omitted that provision in the version of the Consent Decree that was lodged with the Court on May 29, 2020. The United States and Sprague acknowledge this error and have corrected it in the amended version of the Consent Decree filed with this Responsiveness Summary for entry by the Court. Sansevero Decl. ¶ 14. This corrected version of the Decree restores the inadvertently omitted language. Decree App. G ¶¶ 9-10.

[5] Motion Ex. 2 (Public Comments), Bates Nos. SPC00050-51 (South Portland / Morelli comment), SPC00058-59 (South Portland / Morelli comment), SPC00079 (Envtl. Health Strategy Ctr. / Woodbury comment).

III. Comments Regarding Hazardous Air Pollutants and Related Health Effects

Commenters express concern over toxic air emissions or hazardous air pollutants and related health effects.[6]

This case addresses emissions of VOCs, not hazardous air pollutants (HAPs).[7] EPA investigated and calculated HAPs emissions from the heated storage, loading, and unloading of No. 6 oil and asphalt at Sprague's Facilities and determined that the HAP emissions were below federally regulated levels. Sansevero Decl. ¶ 15. EPA found no violations of Clean Air Act regulations governing HAPs. By contrast, EPA found violations related to VOC emissions. Accordingly, the case concerns only alleged violations of the Clean Air Act and state SIPs governing VOC emissions from heated No. 6 oil and asphalt tanks at these Facilities. While concerns about levels of toxic air emissions or HAPs are important, they are beyond the scope of EPA's authority in this case.

Some commenters raise particular concerns about possible exposure to benzene and naphthalene, which they believe could be components of materials stored at Sprague's Facilities.[8] Benzene and naphthalene are HAPs, of which EPA has not found excessive emissions at Sprague's Facilities.[9] Therefore, as discussed above, the Complaint does not allege violations of the benzene or naphthalene standards under the Clean Air Act.

VOC emissions, which are the subject of the claims in the Complaint, contribute to the formation of ground-level ozone.[10] Ground-level ozone is a primary ingredient in smog.[11]

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[6] Motion Ex. 2 (Public Comments), Bates Nos. SPC00054 (Breslin), SPC00056 (Protect South Portland), SPC00062 (Elders for Future Generations / Brancato), SPC00063 (Braunig), SPC00065 (Dreyman), SPC00066 (Santos), SPC00068 (Harper), SPC00069-70 (Zuckerman), SPC00073, -77-78 (Newington / Selectmen, attaching NHDES Fact Sheet), SPC00080 (Envtl. Health Strategy Ctr. / Woodbury); SPC00081-82 (Taylor).

[7] EPA regulates HAPs in a different manner from VOCs. EPA regulates HAPs because they are known or suspected to cause cancer or other serious health effects, such as reproductive issues or birth defects, or adverse environmental effects. EPA regulates HAPs under Clean Air Act Section 112, 42 U.S.C. § 7412, and the National Emissions Standards for Hazardous Air Pollutants ("NESHAP"). These provisions are not at issue in this case. For more information about HAPs, see generally EPA, *What Are Hazardous Air Pollutants?* currently available at https://www.epa.gov/haps/what-are-hazardous-air-pollutants.

[8] Motion Ex. 2 (Public Comments), Bates Nos. SPC00062 (Elders for Future Generations / Brancato), SPV00069 (Zuckerman), SPC00077 (Newington / Selectmen) , SPC00081 (Taylor).

[9] EPA, *The Clean Air Act Amendments of 1990 List of Hazardous Air Pollutants*, currently available at https://www3.epa.gov/airtoxics/orig189.html.

[10] *See* Sansevero Decl. ¶ 4 ("VOCs are regulated under the SIPs to address the Clean Air Act's ground-level ozone requirements"); s*ee generally* EPA, *The Ozone Problem*, currently available at https://www3.epa.gov/region1/airquality/oz_prob.html.

[11] EPA, *Ground-Level Ozone Basics*, currently available at https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics.

Ozone forms when VOCs react with oxides of nitrogen ("NOx") in sunlight.[12] Under the Act, EPA has designated ozone as an ambient air pollutant and has developed a national ambient air quality standard ("NAAQS") for ozone. 40 C.F.R. § 50.9. EPA sets NAAQS for six principal pollutants, which are commonly called "criteria" pollutants and include ozone.[13]

From 1992 through 2006, all six Sprague Facilities, located in Massachusetts, Maine, New Hampshire, and Rhode Island, were in NAAQS nonattainment areas for ozone.[14] Under Section 184(b)(2) of the Act, 42 U.S.C. § 7511c(b)(2), these states are located in an "Ozone Transport Region."[15] Therefore, the Sprague facilities located in these states are required to comply with stringent VOC permitting requirements. Although all of the Facilities, including South Portland and Newington, have been designated as attainment areas for ozone since 2007, because they are located in the Ozone Transport Region, they remain subject to nonattainment-area VOC emission control requirements. *Id.*

In the Complaint, the United States seeks civil penalties and injunctive relief arising from alleged violations of requirements limiting VOC emissions, under the Clean Air Act and applicable state SIPs, at the six Sprague Facilities. To resolve these claims, therefore, the Decree requires Defendants to implement measures designed to limit VOC emissions from the Facilities and, where applicable, to amend the Facilities' air emissions permits, to address these Facilities' contributions to the production of ground-level ozone in the region.

By implementing the injunctive measures required by the Consent Decree, EPA estimates that Defendants will reduce potential VOC emissions from the affected Facilities by at least 80 tons per year, a total of at least 400 tons over the five-year life of the Consent Decree. Sansevero Decl. ¶ 9. These limitations and reductions will help all of New England remain in attainment with the NAAQS for ozone. The Consent Decree thus will achieve real environmental benefits for the communities in the region affected by Defendants' violations.

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[12] EPA, *The Ozone Problem*, currently available at https://www3.epa.gov/region1/airquality/oz_prob.html.

[13] EPA, *NAAQS Table*, currently available at https://www.epa.gov/criteria-air-pollutants/naaqs-table.

[14] 56 *Fed. Reg.* 56694, 56772 (1991). Areas where the air quality falls short of a NAAQS, such as ozone, are designated as "nonattainment areas." EPA, *The Clean Air Act in a Nutshell: How it Works*, at 4, currently available at https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history#textat. Areas where air quality meets NAAQS standards are called "attainment areas." *Id.*

[15] All facilities in the Ozone Transport Region, which includes 12 East Coast states, from Virginia to Maine, and the District of Columbia, are required to meet specific limits on ozone emissions. *See* EPA, *The Clean Air Act in a Nutshell: How it Works*, at 8, currently available at https://www.epa.gov/clean-air-act-overview/clean-air-act-nutshell-how-it-works.

IV. Comments Regarding Odor Complaints in Newington and South Portland

The City of South Portland and several of its citizens, submitted comments expressing concern about odors related to Sprague's South Portland Facility. The Town of Newington submitted a comment expressing concern about odors believed to be associated with Sprague's Newington Facility, attaching odor complaints submitted to the Town by area residents within the preceding two years. [16] ***The Town also comments that the Consent Decree at Appendix H should provide that EPA shall conduct an inspection of the Newington Facility to determine whether Sprague should be required to design and install carbon systems for heated tanks at the facility.*** [17]

Although the Clean Air Act and the applicable SIPs do not regulate odors as pollutants, the Consent Decree includes supplemental measures that Sprague has agreed to take to address odors at the Quincy and South Portland Facilities. The carbon bed systems described in Appendices B and G of the Consent Decree are designed to reduce potential impacts from vapors emanating from heated tanks at those Facilities, respectively. Sprague has agreed to install and operate such carbon systems in South Portland and Quincy in light of the apparent connection between its operations and a history of odors in the surrounding community. The South Portland system is similar to an odor control system to be installed at the nearby Global Partners facility under the Consent Decree entered by the Court in *United States v. Global Partners LP*, No. 2:19-cv-122-DBH, 2019 WL 6954274, at *1 (Dec. 19, 2019), and to an odor control system already in place at Sprague's Quincy Facility.

A comment by the City of South Portland asks that the carbon bed systems required under the Consent Decree in this case be made operational at all times. Motion Ex. 2 (Public Comments) at Bates Nos. SPC00051 (South Portland / Morelli Comment). The Consent Decree does, in fact, have such a requirement. Appendix G, Paragraph 6.a, requires Sprague to establish an operation and maintenance plan for the carbon systems with "provisions for operation so as to reduce local impacts of air pollution during all periods when products are stored at any of the facility's Heated Tanks."

The Consent Decree does not require a similar carbon system at the Newington Facility for odor control. As noted earlier, the Clean Air Act does not regulate odors. While odor control could be the subject of an agreement between the parties, Sprague agreed to such measures for its South Portland Facility, but not for its Newington Facility. Although Sprague does have equipment in place in Newington that is now being used for odor control, Sprague disputes that the company's operations at the Newington Facility are the cause of the odor complaints. Sprague has stated in the attached sworn declaration by its Director of Health, Safety, Environment and Sustainability, Jay Leduc, that Sprague investigated the timing and

[16] Motion Ex. 2 (Public Comments) at Bates Nos. SPC00014-31, -39-46, -48 (Newington / Roy / Sabine / Boy), SPC00032-33, -47 (Submitted to Newington), SPC00049 (Klanchesser), SPC00062 (Brancato), SPC00063 (Braunig), SPC00066 (Santos), SPC00072, -77-78 (Newington / Selectmen, attaching NHDES Fact Sheet), SPC00076 (VHB / Tat).

[17] *Id.* at Bates Nos. SPC00072-75 (Newington / Selectmen, attaching proposed revised Appendix H).

locations of odor complaints by Newington residents and has taken steps to log, assess, and address odors that may be connected to Sprague's operations. Motion Ex. 5 (Leduc Declaration) ¶¶ 6-14. In addition, according to Sprague, from April to August 2020, the New Hampshire Department of Environmental Services ("NHDES") investigated the Newington Facility in response to odor complaints and observed little to no odors emitted off-site during vessel unloading operations. *Id.* ¶ 15. Sprague suggests that the odors may be due, in part or primarily, to a large asphalt paving project conducted at the time of the odor complaints on roads in the vicinity of the facility. *Id.* ¶¶ 6-14 (attesting to other possible sources of odors in the area of its Newington Facility, and attaching a map showing the locations of odor complaints in relation to the Sprague Facility and the highway project). Nevertheless, Sprague represents that, in Summer 2020, it reactivated the odor control system at its Newington Facility and that it is "committed to working cooperatively with the NHDES and the Town of Newington to address any odors that are associated with the Newington Facility." *Id.* ¶ 17.

The United States does not believe that the need for further odor control measures at the Newington Facility has been established. Sprague now has restarted its existing odor control system at the Newington Facility and has committed to cooperating with the Town and NHDES to address any odors associated with that Facility. Thus, the circumstances at the Newington Facility are different from those at the South Portland Facility (where such controls do not currently exist).

Although the Complaint does not address odors, the measures Sprague is required to implement under the Consent Decree to limit VOC emissions include constraints on throughput of heated petroleum products and on the number of heated tanks in operation and the types of products contained in those tanks. To the extent that the comments regarding odors relate to VOC emissions from Sprague's Facilities, these measures required by the proposed Decree may reduce those odors.

V. Comments Regarding Actual Emissions And Potential Emissions

South Portland has concerns about the "estimated emissions of Sprague's tank farm." The City's "Clean Air Advisory Committee" reviewed and "found compelling two calculations that call into question the accuracy of estimated emissions from tank farms in South Portland, in particular emissions calculations that use estimated vapor pressure for heated asphalt." South Portland believes that Sprague may be emitting "significantly above its calculated levels."[18]

EPA used the results of the emission tests at Sprague's Searsport Facility in 2012 and 2013 to determine that the Consent Decree will bring the Facilities into compliance with SIP requirements in the relevant states, including Maine. EPA believes that the emission test results upon which it relied are more accurate and reliable than the emissions modelling estimates used

[18] Motion Ex. 2 (Public Comments), Bates Nos. SPC00051, -59 (South Portland / Morelli); *see also id.* at Bates No. SPC00079 (Envtl. Health Strategy Ctr. / Woodbury) ("There remains concern about the uncertainty and scale of Sprague's actual emissions.").

by Sprague in its license amendment applications to the Maine Department of Environmental Protection ("ME DEP") in 2015, and incorporated by the ME DEP into the subsequent license amendments. Sansevero Dec. ¶¶ 19-20.

The Town of Newington recommends that the Consent Decree require continuous, actual VOC emissions monitoring and set throughput limits based on the outcome of such monitoring. If continuous monitoring is deemed impossible, then the Town requests that "a monitoring regimen be implemented, which measures actual emissions on a frequent basis when transfer operations are occurring and when tanks are in use." If such a monitoring regime is not possible, then the Town requests "the use of true vapor pressure when setting limits based on calculated emissions."[19] ***South Portland and several residents and nonprofit organizations submitted similar comments, requesting that the Consent Decree require continuous VOC monitoring and make Sprague's actual emissions the basis of Sprague's throughput limits at the South Portland Facility.***[20]

EPA has determined that the Consent Decree's throughput limits and other limits for the Newington and South Portland Facilities are sufficient to ensure that the facilities operate as "minor sources" of VOC emissions, defined as below 50 tons per year of VOCs. Sansevero Decl. ¶ 6. These limits are based on the testing of VOC emissions from heated No. 6 oil and asphalt storage tanks at Sprague's facility in Searsport, Maine, and thus are based on actual emissions from tanks owned by the same company, storing and processing the same types of products, and otherwise comparable to the tanks at issue in this case.

The Consent Decree requires Sprague to apply for appropriate permits from the NHDES and ME DEP containing terms no less stringent than the injunctive provisions of the Decree.[21] In EPA's view, the requirements of the Decree will be sufficient to bring the No. 6 oil and asphalt operations at Sprague's facilities into compliance with the applicable SIPs. Through the state permitting process, the state agencies may impose other or more stringent conditions within their authority, as they deem appropriate. The Consent Decree does not limit such state authority.

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[19] *Id.* at Bates Nos. SPC00072-73 (Newington / Selectmen).

[20] *Id.* at Bates Nos. SPC00051 (South Portland / Morelli), SPC00062 (Elders for Future Generations / Brancato), SPC00071 (Zuckerman), SPC00079 (Envtl. Health Strategy Ctr. / Woodbury), SPC00082 (Taylor).

[21] *See* permitting requirements at Decree App. C ¶¶ 3-4 (Everett Facility), D ¶¶ 4-5 (Quincy Facility), F ¶¶ 3-4 (Searsport Facility) (including permit/license amendment requirements). Such permitting provisions are not relevant for the Providence or New Bedford Facilities. The Providence Facility does not require a permit, or permit amendment, because under the Consent Decree Sprague must implement operational limits that will keep emissions at this facility below the level requiring a permit under the RI SIP. Sansevero Decl. ¶ 13; Decree App. I. The New Bedford Facility does not require a permit, or permit amendment, because it does not currently store either No. 6 oil or asphalt. While this facility therefore is not the subject of any claim in the Complaint, to avoid future violations, the Consent Decree requires that, before Sprague can restart No. 6 oil or asphalt storage operations at the New Bedford Facility, it must first obtain a permit from MA DEP. Sansevero Decl. ¶ 12; Decree App. E ¶ 2.

Continuous emissions monitors for VOCs can be requested in such permit applications and, in some circumstances, may be required by a state permitting authority. As noted, in EPA's view the requirements of the Consent Decree are sufficient to maintain the Facilities as minor sources of VOCs, without supplemental monitoring systems. Sansevero Decl. ¶ 6.

VI. Comments Regarding Technical Aspects of Injunctive Relief

The City of South Portland and the Town of Newington comment that they should be permitted to review and comment on the Design Plan and Operation and Maintenance Plan relating to the carbon systems required by the Consent Decree for the South Portland and Newington facilities.[22] The Town also comments that the carbon bed systems at the Newington Facility should be operational at all times.[23]

As described in the Declaration of Sprague's Director of Health, Safety, Environment and Sustainability, Jay Leduc, Sprague is implementing measures at the Newington Facility, in cooperation with the Town and with the NHDES, to address the concerns that Sprague's facility may be causing odor problems in the area. Leduc Decl. ¶¶ 16-17. For example, according to Mr. Leduc, there is equipment in place at the Newington facility that is being used, and can be used in the future, to address odor complaints. *Id.* The United States believes that the other injunctive measures required at the Newington Facility, under Appendix H of the Consent Decree, are sufficient to limit VOC emissions in order to bring the facility into compliance with the provisions of the NH SIP cited in the Complaint. Sansevero Decl. ¶ 8. To the extent that commenters wish to seek measures more stringent than those required by the Consent Decree, they may do so through the applicable state permitting process or other means, in coordination with state or local governments and/or Sprague.

Regarding the South Portland Facility, because the United States is the only party asserting claims against Sprague for violations at this facility, and the only party resolving those claims through the Consent Decree, it is appropriate that the Consent Decree provides for review and approval of the deliverables for that facility, including the Design Plan and the Operation and Maintenance Plan, by EPA only. *See* CD § VI (regarding compliance requirements, including approval of deliverables). Nevertheless, EPA would consider any comments the City may submit.

South Portland and Newington request that, if storage tanks are converted from asphalt to No. 6 oil in South Portland and Newington, the Consent Decree should require offsets locally, in South Portland and Newington, respectively, rather than regionally, at any of Sprague facilities in New England.[24]

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[22] Motion Ex. 2 (Public Comments) at Bates Nos. SPC00052 (South Portland / Morelli), SPC00073 (Newington / Selectmen), SPC00080 (Envtl. Health Strategy Ctr. / Woodbury).

[23] *Id.* at Bates No. SPC00073 (Newington / Selectmen).

[24] Motion Ex. 2 (Public Comments) at Bates Nos.SPC00052 (South Portland / Morelli), SPC00060-61 (Protect South Portland / Burger), SPC00080 (Envtl. Health Strategy Ctr. / Woodbury), SPC00073-74 (Newington / Selectmen).

These comments express concern that, under the Consent Decree, Sprague may convert a tank at the company's Newington Facility from the storage of asphalt to the storage of more emissive No. 6 oil, provided that Sprague gives sufficient advanced notice of such conversion and offsets the conversion's effect on VOC emissions at that facility by reducing VOC emissions at another facility in Sprague's New England system. *Id.* That concern is misplaced. Such conversion and offset is allowed only at the South Portland facility, under Appendix G of the Consent Decree; it is not allowed at the Newington Facility under Appendix H of the Decree.

The comments express the concern that any such offset for a conversion at the South Portland or Newington Facility should be "local" (i.e., limited to South Portland or Newington, respectively) rather than "regional" (i.e., anywhere else in New England). EPA disagrees. First, as stated above, the Decree does not allow any such conversion or offset at the Newington Facility. Second, the regional offset provision applicable to the South Portland Facility is appropriate because VOCs are regulated under the ME SIP due to their contribution to ozone levels regionally, rather than locally, in order to meet and maintain the NAAQS for ozone. Furthermore, under the ME SIP, offsetting emission reductions may be obtained from any sources within the Ozone Transport Region, which encompasses all of New England. ME SIP Chapter 113, Section 2.C.3.b.

Residents of South Portland request that EPA mandate that best available control technology be installed by Sprague.[25] Suggested measures include continuous emissions monitoring, fenceline monitoring, and vapor recovery units.[26]

Appendix G of the Consent Decree requires that Sprague implement several measures to address VOC emissions at its South Portland Facility, including: operating no more than six heated tanks containing asphalt; limiting the throughput of asphalt; converting no more than one of these six tanks from asphalt to No. 6 oil, provided that Sprague gives 90 days advanced notice to EPA and ME DEP and offsets the possible effect of such a switch on regional ozone levels by reducing VOC emissions by at least seven tons per year elsewhere at its New England facilities; and applying for a state permit modification with terms at least as stringent as those required by the Consent Decree. EPA believes these measures will be sufficient to address VOC emissions at this facility by resolving the violations of the ME SIP alleged in the Complaint. Sansevero Decl. ¶ 8. To the extent that local residents or officials seek more stringent measures, they may pursue those through the state permitting process or other means, in coordination with Sprague and/or state or local governments.

VII. Comments Regarding Penalty

[25] Motion Ex. 2 (Public Comments) at Bates Nos. SPC00054 (Breslin), SPC00055 (Curry), SPC00057 (Protect South Portland / Burger) , SPC00063 (Braunig), SPC00065 (Dreyman), SPC00066 (Santos), SPC00070-71 (Zuckerman).

[26] *E.g.*, *id.* at Bates Nos. SPC00070-71 (Zuckerman), SPC00082 (Taylor).

South Portland expresses surprise that the Consent Decree does not include penalties "in the state of Maine." South Portland requests that the Consent Decree include provisions for payment to the City of South Portland, the State of Maine, or both, in "compensation" or "to reimburse the significant expense incurred in reaction to these violations."[27]

The Commonwealth of Massachusetts is a party to this action and will receive a penalty payment under the proposed Consent Decree. The State of Maine is not a party and so will not receive such a payment. Furthermore, sharing a federal penalty with Maine or South Portland would be prohibited by federal law. Under the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), any civil penalty paid in settlement of the federal claims in the Complaint must be deposited into the United States Treasury. There is no authority under federal law or Massachusetts law, under the circumstances of this case, for "reimbursing" or "compensating" another state or out-of-state local government. *See United States v. LTV Steel Co. Inc.*, 269 B.R. 576, 583 n.8 (W.D. Pa. 2001) ("Civil penalties under the [Clean Air Act] . . . are paid into the United States Treasury and are not earmarked for any specific purpose."); *United States v. Global Partners LP*, No. 2:19-cv-122-DBH, 2019 WL 6954274, at *5 n.6 (Dec. 19, 2019) ("The $40,000 penalty cannot be considered compensation to state and local government . . . because federal law requires it be paid to the federal government, not the state or city.") (citing 31 U.S.C. ¶3302(b)).

The penalty is too low and does not adequately address Sprague's violations.[28]

To determine the amount of any penalty, the court considers the penalty factors set forth in Section 113(e) of the Act: (1) size of the business; (2) economic impact of the penalty on the business; (3) violator's full compliance history and good faith efforts to comply; (4) duration of the violations; (5) any previous payment of penalties for the same violation; (6) economic benefit of noncompliance; (7) seriousness of the violation; and (8) other factors as justice may require. *See* 42 U.S.C. § 7413(e).

In determining an appropriate penalty, the United States also considered EPA's Clean Air Act Stationary Source Civil Penalty Policy, currently available at https://www.epa.gov/enforcement/clean-air-act-stationary-source-civil-penalty-policy-october-25-1991. This penalty policy is designed to ensure that settlements impose penalties consistently across the regulated community and that the policy objectives of a penalty, including punishment and deterrence, are achieved. *Id.* The penalty policy includes an economic benefit component, calculated by a publicly available computer model known as BEN, and a gravity component. One of the primary goals of a civil penalty is to eliminate the economic benefit the company was able to obtain by not complying with the Clean Air Act. The gravity component is designed to ensure that specific and general deterrence is achieved by the penalty. Further, EPA's penalty policy allows for settlements to incorporate appropriate discounts for litigation risk. *Id*. at 19-20.

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[27] *Id.* at Bates Nos. SPC00052, -61 (South Portland / Morelli), SPC00080 (Envtl. Health Strategy Ctr. / Woodbury).

[28] Motion Ex. 2 (Public Comments) at Bates No. SPC00062 (Elders for Future Generations / Brancato).

Here, the penalty is appropriate. As discussed in the Motion, courts show deference to the United States when fashioning environmental consent decrees. "The presumption in favor of settlement is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency specially equipped, trained or oriented in the field," such as EPA. *United States v. Cannons Eng'g Corp*, 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990). Courts review each element of a settlement in the context of the whole to determine whether it is reasonable. *See United States v. Kerr-McGee Corp*., No. 07-CV-01034, 2008 WL 863975, at *9 (D. Colo. Mar. 26, 2008) (reviewing all terms of a consent decree and concluding that a "relatively modest civil penalty assessment is counterbalanced by its injunctive provisions") (citation omitted). Thus, depending on the context and circumstances, even a consent decree with no penalty can be appropriate. *See United States v. District of Columbia*, 933 F. Supp. 42, 51 (D.D.C. 1996) (finding a decree reasonable, even though United States had made a "conscious decision not to seek penalties").

In this case, when viewing the Consent Decree as a whole, its terms are fair, reasonable, and consistent with the Clean Air Act. *See United States v. Comunidades Unidas Contra la Contaminacion*, 204 F.3d 275, 279 (1st Cir. 2000) (discussing standard for entry of a Consent Decree). Under the Decree, Sprague will pay $350,000 in civil penalties, including $205,000 to the United States and $145,000 to Massachusetts. In addition, Sprague estimates it will spend at least $769,000 to implement the injunctive relief measures of the Consent Decree. The United States, Massachusetts, and Sprague negotiated the settlement as a comprehensive resolution, including the civil penalty, in good faith, represented by competent counsel, with access to expert technical consultants. Where, as here, a proposed consent decree is "the product of good faith, arms-length negotiations" it is "presumptively valid." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (citation omitted); *see* Motion § III (including additional reasons why the civil penalty required by the Decree is fair, reasonable, and consistent with the governing statute).

VIII. Miscellaneous Comments

South Portland comments that Maine DEP does not agree with some or all of the allegations against Sprague in the Complaint.[29]

ME DEP has not submitted any public comments regarding the proposed Consent Decree, and EPA has communicated appropriately with ME DEP with respect to the alleged violations. Long before it filed the Complaint and lodged the proposed Consent Decree, the United States, through EPA, notified ME DEP of Sprague's alleged violations, including providing ME DEP copies of two Notices of Violation that it issued to Sprague, at or about the time of their issuance in 2014, as required by Section 113(a) of the Clean Air Act.[30]

[29] Motion Ex. 2 (Public Comments) at Bates No. SPC00004 ¶ 4 (South Portland / Kendall).

[30] 42 U.S.C. § 7413(a); *see* Sansevero Decl. at ¶¶ 18-20 (identifying NOVs and describing communications between EPA and ME DEP regarding Sprague's alleged violations).

Following EPA's issuance of the NOVs to Sprague concerning the Searsport and South Portland Facilities, Sprague applied to ME DEP on June 15, 2015, for emission license amendments addressing VOC emissions from its No. 6 oil and asphalt storage tanks. In its applications, Sprague relied on modelled VOC emissions estimates rather than the results from the emission testing conducted at Sprague's Searsport Facility in 2012 and 2013. Sansevero Decl. ¶ 19.

On July 15, 2015, ME DEP issued amended air emission licenses to Sprague's Searsport and South Portland Facilities, based on Sprague's modelled emissions estimates, which were lower than the results of the actual emission testing at Sprague's tanks. EPA believes that the results of the VOC emission tests at Sprague's heated petroleum storage tanks, based on codified EPA methods and site-specific test data, are more accurate and reliable than modelling estimates of the tanks' VOC emissions. Sansevero Decl. ¶ 20.

EPA stands by its findings with respect to the alleged violations and the results of emissions testing, and has independent authority to enforce the applicable provisions of the ME SIP. 42 U.S.C. § 7413(a)-(b).

South Portland citizens should be compensated for illnesses and ruined property value relating to Sprague's emissions.[31] Compensation also should be provided to the South Portland School District, Health Department, and early childhood development programs for the community's exposure to Sprague's toxic air emissions and related health effects.[32]

As discussed above, to the extent commenters request that the United States require Sprague to pay penalties to individuals or local organizations, under federal law, any civil penalty paid in settlement of the federal claims in the Complaint must be deposited into the United States Treasury. Miscellaneous Receipts Act, 31 U.S.C. § 3302(b); *see LTV Steel*, 269 B.R. at 583 n.8 ("Civil penalties under the [Clean Air Act] . . . are paid into the United States Treasury and are not earmarked for any specific purpose."); *Global Partners*, 2019 WL 6954274, at *5 n.6 ("The $40,000 penalty cannot be considered compensation to state and local government . . . because federal law requires it be paid to the federal government, not the state or city.") (citing 31 U.S.C. ¶3302(b)). Otherwise, redress for any harms to third parties is outside the scope of the Complaint and therefore cannot be included in the Consent Decree.

[31] Motion Ex. 2 (Public Comments), at Bates No. SPC00064 (Tate).

[32] *Id.* at Bates No. SPC00082 (Taylor).